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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 876

FRANCES D. KROHN,
Petitioner,

VS.

RICHARDSON-MERRELL, INC., THE WILLIAM S. MERRELL COMPANY DIVISION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions are as stated in Petition for Writ of Certiorari, Page 2.

JURISDICTION

Petitioner's statement under this heading contained on Page 2 of the Petition is correct with the exception of the following statement:

> "The federal question was raised and decided adversely to Petitioner in the State Court proceedings."

It is Respondent's contention that the Federal question was not properly and timely raised in the State Court proceedings and that there was no holding or decision by the Supreme Court of Tennessee on any Federal question.

RULES OF COURT INVOLVED

Rule 14 of the Rules of The Supreme Court of Tennessee as contained in Tennessee Code Annotated, Volume 1, pages 818-819 provides as follows:

> "Rule 14.
>
> *Assignment of Errors.*—The assignment of errors shall contain in the order herein stated:
>
> (2) *Errors specified, how.*—A statement of the errors of fact or law relied upon to reverse or modify the same, showing specifically wherein the action complained of is erroneous, and how it prejudiced the rights of the appellant, or plaintiff in error, and reference to the pages of the record where the ruling of the court on matters constituting errors of law appears; and in case it is an error of fact, to the pages of the record where the testimony is to be found relied upon to sustain the same."

PROPOSITIONS PRESENTED

I.

The Supreme Court of the United States should not take jurisdiction of a case in which the highest court of a state has held that the Federal constitutional issue has not been properly and timely raised in the State Court proceedings.

II.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States cannot nor should the Supreme Court of the United States create a common law cause of action.

STATEMENT

The Respondent contends that there are certain inaccuracies in the statement in the Petition for Certiorari which should be corrected. The Supreme Court of Tennessee held in this case that the Federal constitutional issue had not been properly and timely raised in the State Court proceedings. Therefore, the Tennessee Court did not have before it the contention that the common law rule violated the Equal Protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States as is set forth on Page 5 of the Petition for Certiorari filed herein. The Supreme Court of Tennessee made no holding on the constitutional question as is contained in Petitioner's statement at the top of Page 6 of the Petition. The opinion rendered by the Supreme Court of Tennessee following the Petition for Rehearing filed by the Petitioner in that Court made no holding on any Federal constitutional question. To the contrary, the Court held that it was content to abide by its original opinion.

The Supreme Court of Tennessee held in this case that under the common law a wife had no cause of action for loss of consortium and that, since this decisional law has not been changed by statute the law of Tennessee remains that there can be no recovery by a wife for loss of consortium by reason of injury to her husband. *Krohn* v. *Richardson-Merrell, Inc.*, 406 S. W. 2d at 167.

SUMMARY OF ARGUMENT

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI AND FOR THIS COURT NOT INVOKING ITS JURISDICTION.

I.

The constitutional issue raised in the Petition for Certiorari filed herein was not properly and timely raised in the State Court proceedings.

II.

The Supreme Court of Tennessee did not decide a Federal constitutional question and a decision on the constitutional issue was not necessary to the determination of the case by the Tennessee court.

III.

The decision of the Supreme Court of Tennessee rests on adequate State or non-Federal grounds.

IV.

Even if it be determined that the Federal or constitutional question was properly raised in the State Court proceedings, certiorari should not be granted nor jurisdiction taken because of the following:

A. The function and purpose of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is to protect existing and vested rights and; where there is no such right in existence or vested in the complaining party, there is nothing for the Constitution to protect.

B. It is not the function of this Court or of the Constitution of the United States to create new rights in that the purpose and function of the United States Constitution is to guarantee and protect existing and vested rights.

C. The Constitution of the United States and particularly the Equal Protection Clause of the Fourteenth Amendment will strike down legislation or other State action which unlawfully discriminates and denies existing vested rights, but where there is no existing or vested right, there can be no unlawful discrimination or denial.

D. No conflict exists between Federal and State Courts on the question of a wife's right to sue for the loss of her husband's consortium except to the extent that certain States do allow a wife such a cause of action while others do not.

E. It is settled law in Tennessee that there is no cause of action in a wife for loss of consortium of her husband and no conflict exists in Tennessee between any courts, State or Federal, on this question.

F. There is no United States Constitutional requirement of uniformity in causes of action in the different states.

ARGUMENT

It is respectfully submitted that a reading of the opinions of the Supreme Court of Tennessee in this case shows that the Tennessee Court expressly held that the Petitioner herein did not properly and timely raise the Federal constitutional question or issue now asserted. The Court stated:

> "Argument is made that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires this Court to allow the wife recovery for loss of consortium, since the same is allowed a husband. To fail to do so, it is said, is to discriminate on the basis of sex; and that such is not a proper or legal basis for discrimination. *In the first place, we do not find this question to be properly and timely made by the assignments of error in this case.* (Emphasis supplied) See *F. Whitehurst* v. *Howell,* (1936) 20 Tenn. App. 314, 98 S. W. 2d 1071; *Taylor* v. v. *Elgin,* (1918) 140 Tenn. 602, 205 S. W. 428." Appendix to Petition for Writ of Certiorari, P. 8(a) and 406 S. W. 2d at 168.

Respondent would further respectfully point to the opinion of the Court on the Petition to Rehear and call this Honorable Court's attention to the last sentence contained therein where the Supreme Court of Tennessee stated: "We are content to abide the Court's original opinion." Appendix to Petition of Certiorari, 10(a) and 406 S. W. 2d at 169.

It is clear that the Supreme Court of Tennessee held that the assignments of error did not properly raise the constitutional issue which is now asserted by the Petitioner herein. It is Respondent's contention that this Court cannot and should not grant a Petition for Writ of Certiorari when the highest court of a state has held that the Federal

question has not been properly raised in the State proceeding. The Supreme Court of the United States cannot entertain a question not properly raised in the State Court nor actually decided by that Court. In *Beck* v. *Washington*, 369 U. S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955, this Court stated:

> "The failure to inject the equal protection contention into the case was carried forward to the proceedings before the Washington Supreme Court when petitioner failed to comply with that court's rule prescribing the manner in which contentions are to be brought to its attention. Rule 43 of the Rules on Appeal Revised Code of Washington provides that '[n]o alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the assignments of error in appellant's brief.' " 369 U. S. at 552.

The opinion by the Supreme Court of Tennessee in this case expressly holds that the constitutional question was not properly raised by the assignments of error. The Court cited the Tennessee case of *Whitehurst* v. *Howell*, 20 Tenn. App. 314, 98 S. W. 2d 1071 which held that matters not contained in the assignments of error are not entitled to consideration. Rule 14 of Rules of the Supreme Court of the State of Tennessee provides that the assignments of error must contain:

> "A statement of the errors of fact or law relied upon to reverse or modify the same, showing specifically wherein the action complained of is erroneous, and how it prejudiced the rights of the appellant, or plaintiff in error, . . ." Tennessee Code Annotated, Vol. 1, Page 819.

There is no doubt but that the language contained in the opinions of the Supreme Court of Tennessee regarding the Equal Protection Clause of the Fourteenth Amendment was mere dicta and discussion. This Court has previously held that mere discussion of Federal questions in the opin-

ion of a State Court is insuffcient to give the Supreme Court jurisdiction. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 100 L. Ed. 118, 76 S. Ct. 824; *Armstrong* v. *Armstrong*, 350 U. S. 568, 100 L. Ed. 705, 76 S. Ct. 629; *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 88 L. Ed. 526, 64 S. Ct. 384.

This Court has previously held that for it to review a State Court decision it must appear that: (1) the State Court actually decided a Federal question, and, (2) that the decision of the Federal question was necessary to the State Court's determination of the cause. Even if this Court should decide that the opinions rendered by the Supreme Court of Tennessee make it uncertain as to whether that Court did or did not pass upon a Federal constitutional question, this Court, to avoid the necessity of reaching constitutional issues, will construe the State Court's decision as not have passed upon the constitutional question. See *Armstrong* v. *Armstrong*, supra. Certainly, the constitutional question now asserted by Petitioner was not necessary to the determination of this case by the Tennessee Court. In substance, the Tennessee Court held the following: (1) at common law the wife had no right of action for loss of consortium; (2) Tennessee is a common law state, and; (3) so much of the common law as has not been abrogated or repealed by statute is in full force and effect. The Tennessee Court held this to be the law in *Rush* v. *Great American Ins. Co.*, 213 Tenn. 506, 376 S. W. 2d 454 which was decided only two years prior to the decision of this case. The Tennessee Court in the case at bar held that it was its intention to fully adhere to the doctrine of the *Rush* decision. Appendix, *Petition for Writ of Certiorari*, P. 6(a) and 406 S. W. 2d at 167. Certainly, the decision of the Supreme Court of Tennessee in this case rests on adequate State or non-Federal grounds. See *Black* v. *Cutter Laboratories*, supra, and *Herb* v. *Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459.

The Respondent respectfully insists that even if this Honorable Court should determine that the Federal constitutional question was properly and timely raised in the State Court proceeding and further; that the State Court actually decided a Federal question; that the decision of the Federal question was necessary to the State Court's determination of the case; and, that the decision of the Tennessee Court did not rest on adequate State grounds there is still no proper basis for this Court to invoke its jurisdiction in this case and review this case.

It is respectfully asserted that the function and purpose of the Equal Protection Clause of the Fourteenth Amendment is to protect existing and vested rights. The Tennessee Court has held that it is a common law state. That Court has held that at common law there was no right vested in a wife to sue for loss of consortium caused by injury to her husband. The Tennessee Court has refused to create such a right, but has held that such creation is for the legislature. *Rush* v. *Great American Ins. Co.*, supra and *Krohn* v. *Merrell-Richardson,* etc., supra. Therefore, in that there is no right or cause of action in existence in Tennessee, there is no right for the Federal constitution to protect. It is certainly not the function of this Court nor of the Constitution of the United States to create and give birth to rights which are non-existent. The Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment will "strike down" legislation which is hostile and which unlawfully discriminates and denies existing and vested rights. Where there are no existing or vested rights, there can be no unlawful discrimination or denial of such rights. There is thus nothing for the Equal Protection Clause to "strike down". There is no hostile legislation which is discriminating against the Complainant.

In regard to the subject matter of the law in question, it is submitted the only action this Court can take would be to strike down the law which allows a husband such a right of action on the ground that allowing this right to the husband discriminates against the wife. This question is not at issue here. The Petitioner is asking this Court to create a new right in a party and not to strike down legislation which is denying an existing right. The Constitution relates to existing institutions and does not cover rights, privileges and obligations not specified and not existing. The purpose of the Equal Protection Clause of the Fourteenth Amendment is to prevent any person or class from being singled out as a special subject of hostile or discriminatory legislation.

A right or cause of action may be vested, and, if so, is property in the same sense in which tangible things are property and is equally protected against arbitrary interference, and whether it springs from contract or from the principles of the common law, the legislature may not take it away. *Gibbs* v. *Zimmerman,* 290 U. S. 326, 78 L. Ed. 342, 54 S. Ct. 140. All that a litigant is guaranteed by the Fourteenth Amendment is a *preservation* of his substantial right to redress by some effective procedure. The State has complete control over the remedies which it offers to suitors in its courts, even to the point of making them applicable to rights or equities already in existence. *Gibbs* v. *Zimmerman,* supra.

The Petitioner contends that there is presently a conflict in the decisions of the State and Federal courts respecting the constitutional question which is presented in this Petition. The Respondent respectfully asserts that there is no such conflict. Certain State jurisdictions allow a wife such a cause of action while others do not. Only to this extent can it be said that there is a conflict between

decisions of different courts. There is no Federal common law. There is no showing in the Petition of any conflict between any courts whose decisional law could apply to or govern the decision in this case. In Tennessee the law is settled. The Supreme Court of Tennessee has held what the settled law is. No other State or Federal court within Tennessee has made a holding which is contrary to or, in conflict with the decision in this case as rendered by the Supreme Court of Tennessee. A decision of the Court of Common Pleas of Ohio, *Clem* v. *Brown*, (Ct. of Common Pleas) Ohio, 207 N. E. 2d 398, showing that Court's interpretation of Ohio law, and a decision of a District Court in Michigan, *Owen* v. *Illinois Banking Corp.*, (W. D. Mich. 1966) ..... F. Supp. ....., showing that Court's interpretation of State law do not show a conflict on a Federal question between State and Federal courts as is asserted by the Petitioner. These cases only show that two trial courts or two courts of original jurisdiction have held that the State law of the two State jurisdictions involved allows a wife to sue for loss of consortium. These decisions simply show that different courts have applied the law of separate states differently. These decisions have no application to this case which involves solely a question of Tennessee law on which no conflict exists. There is no Federal constitutional requirement of uniformity in causes of actions in the different states. It is clear that there are decisions in certain other jurisdictions which allow a wife to sue for loss of consortium. Tennessee has held that no such right existed at common law and that no such right can be created judicially. As was stated so succinctly by this Court in *Beck* v. *Washington*, supra:

> "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . or (immunity from judicial error . . .)'

Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 106, 64 L. Ed. 476, 480, 40 S. Ct. 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." 369 U. S. at 554, 555.

CONCLUSION

For the reasons set out above and in view of the applicable decisions of this Court and of the Supreme Court of Tennessee, it is respectfully and earnestly contended that the Petition for Writ of Certiorari in this cause be denied and that this Court refuse to invoke its jurisdiction.

Respectfully submitted,

JOHN K. MADDIN, JR.
Attorney for Respondent

AFFIDAVIT OF SERVICE

I, John K. Maddin, Jr., counsel for the Respondent, being first duly sworn according to law, depose and say:

That this 6th day of March, 1967, a true and exact copy of the foregoing brief has been mailed to the Honorable Lowe Watkins and the Honorable Dan E. McGugin of Watkins, McGugin and Stewart, 603 Commerce Union Bank Building, Nashville, Tennessee, 37201, Counsel for the Petitioner, Frances D. Krohn, as shown by the affidavit on file with this court.

JOHN K. MADDIN, JR.